



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: DHL Enterprises, Inc.

File: B-256451

Date: June 22, 1994

Diane C. Halsey for the protester.
Robert L. Mercadante, Esq., Defense Logistics Agency, for the agency.
David Hasfurth, Esq., Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An offeror's exclusion from discussions because its offer contained a delivery schedule that varied from the one required by the solicitation was improper where the solicitation provided that firms with offers containing varying delivery schedules would not be excluded from discussions simply because of those schedules, and agency conducted discussions with the other offeror regarding its similarly nonconforming delivery schedule.

DECISION

DHL Enterprises, Inc. protests the rejection of its proposal under request for proposals (RFP) No. DLA500-93-R-A140, issued by the Defense Industrial Supply Center (DISC) for the purchase of bolt assemblies, Martin Marietta part number 71330188-009. DHL principally contends DISC improperly failed to conduct discussions with the firm regarding its proposed delivery terms, since discussions concerning delivery terms were conducted with the awardee.

We sustain the protest.

The RFP, issued on May 26, 1993, requested offers by June 25 for a primary quantity of 640, a first alternate quantity of 800, and a second alternate quantity of 960 bolt assemblies. The RFP, issued on the basis of other than full and open competition, permitted offerors other than MFI Corporation, the only acceptable source listed for the assembly, to submit offers subject to subsequent engineering source approval of their technical data packages. The RFP required delivery, f.o.b. destination, within 120 days after award; offerors were permitted, however, to propose delivery

schedules varying from the required schedule. Offerors were advised that if a decision was made to award the contract without discussions, offers complying with the required delivery schedule would be considered for award before those offers failing to meet the required schedule.

Two offers were received. DHL offered unit prices of \$69.50 (640 items), \$65.00 (800 items), and \$65.00 (960 items) and respective total prices of \$44,480, \$52,000, and \$62,400. MFI's item price for all quantities was \$135.11, which gave respective total prices of \$86,470.40, \$108,088.00, and \$129,705.60. Neither offeror's initial proposal took exception to the required 120-day delivery schedule. Subsequent to the receipt of proposals, the agency decided that award would be made on the second alternate quantity of 960 assemblies.

In early July, after DHL's technical data package for its proposed assembly had been reviewed and found acceptable, and the firm's prices were determined to be reasonable, a preaward survey of DHL was initiated. The preaward survey, dated September 13, recommended that no award be made to DHL. While DHL's technical, quality assurance, and packaging capabilities were found to be satisfactory, its production and financial capabilities were found to be unsatisfactory. Due to questions regarding the firm's production capability, the survey activity determined that DHL did not qualify as a manufacturer under the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1988), which requires an offeror to have sufficient functioning machinery to manufacture the items required. DHL's production capability and manufacturer status were questioned mainly because the lathe DHL acquired to manufacture the assemblies was not functioning (for failure to be connected to the appropriate power supply) at the time of the agency's July 14 and August 18 surveys of DHL's facilities. A September 7 letter of credit from Meridian Bank on behalf of DHL in the amount of \$30,000, sent to the survey activity on September 16, was subsequently determined to resolve the issue of DHL's financial capability.

By letter of September 21, the contracting officer notified DHL that its offer had been rejected due to DHL's noncompliance with the Walsh-Healey Act's manufacturing equipment requirements and requested a response within 10 days if DHL believed its offer should not be rejected. The next day, DHL informed the contracting officer that it met both the space and equipment requirements of the Act. By letter of September 27, DHL informed the DISC contract specialist that it had a 5-year lease on its manufacturing plant and had all the qualified personnel and operating equipment needed to produce the assemblies--the lathe had been installed and was in production.

Finding DHL nonresponsive, the contracting officer referred the matter to the Small Business Administration (SBA) on October 7 for consideration of the firm's production capability and Walsh-Healey eligibility, and the possible issuance of a certificate of competency (COC). The SBA received the referral on October 19 and set November 9 as the target date for its decision. On November 3, DHL advised the SBA and DISC that due to "the intervening months it has taken to evaluate the offers," DHL's supplier of the assembly bolt notified the firm that its deliveries would be extended from an originally anticipated 6- to 8-week period to 16-18 weeks and that DHL, accordingly, would have to increase its offered delivery schedule from 120 to 170 days. DHL also informed the agency that it had contacted all listed manufacturers of the bolt and that no one could supply the item earlier; DHL had received two other quotes for deliveries of 19-20 weeks. DHL, however, advised the agency that distributor inventories showed a total of about 240 inventoried bolts in the country and emphasized that "[i]f there is an immediate shortage of this assembly, we can pursue existing inventories and deliver a portion (up to 240 units) of the total requirement in 120 days."

In view of DHL's new delivery schedule, an SBA representative informed DISC that, even though "unofficially" he thought DHL was to be considered a manufacturer under the requirements of the Walsh-Healey Act and could show satisfactory production capability, SBA could not proceed with its COC review, pursuant to Federal Acquisition Regulation (FAR) § 19.602-4(b), which requires the agency to award to the firm seeking the COC if the SBA grants the COC, unless DISC confirmed that DHL remained in line for award despite the changed delivery terms. By letter of November 8, SBA specifically reported to DISC that DHL's modification could not be considered for award unless discussions were conducted with all offerors regarding the extended delivery terms; SBA informed the agency that the COC proceedings would be suspended pending the agency's response as to whether the 120-day required delivery schedule "still stands" or, alternatively, reports on the outcome of discussions with the offerors on the basis of the more relaxed delivery schedule.

The contracting officer decided not to hold discussions with DHL regarding its modified delivery terms. On or about November 29, citing DHL's increased delivery terms (from 120 to 170 days), the contracting officer, by memorandum to the contracting specialist, concluded that DHL was no longer in the area of consideration for award. (The memorandum states that DHL's increased delivery terms were not "in accordance with [the] terms [and] conditions of [the]

solicitation.") The agency decided, however, to conduct discussions with MFI, commencing on December 17. Although a cost analysis of MFI's price indicated that MFI's material costs, overhead, and general and administrative costs were reasonable, the agency requested, during discussions, that MFI lower its profit rate and reduce the number of labor hours needed to manufacture the assembly. MFI was also advised that quicker deliveries of the bolt assemblies were needed due to the existence of a number of priority back orders. MFI reduced the number of labor hours needed for manufacture and lowered its profit rate, lowering the unit price to \$112.20.

Regarding delivery, MFI informed the agency during discussions that due to some items being in MFI's current stock, MFI could deliver 200 assemblies within 60 days of award. However, due to difficulties (similar to those experienced by DHL) in obtaining necessary bolts, MFI informed DISC during discussions that it could only offer delivery of the remaining 760 assemblies within 160 days, reflecting an extension of its earlier proposed delivery terms.

Concluding that MFI's revised terms represented the best offer the agency could obtain, the contracting officer made award to MFI at a unit price of \$112.20, with delivery of 200 bolt assemblies within 56 days of contract award and the remainder within 154 days. Award was made on January 29, 1994. DHL filed its protest of the award with our Office on February 14. On March 2, the agency advised us of its determination that it was in the best interest of the agency to continue performance of the contract, notwithstanding DHL's protest, due to the urgent and compelling circumstances created by numerous back orders for the bolt assembly.

When discussions are held with one offeror, the contracting agency must hold discussions with all offerors whose proposals are within the competitive range and give them an opportunity to revise their proposals. FAR § 15.610; Motorola, Inc., 66 Comp. Gen. 519 (1987), 87-1 CPD ¶ 604.

DHL was excluded from further consideration for award simply because its revised delivery schedule extended beyond the RFP's stated "required" delivery schedule. However, the RFP allowed offerors to propose varying delivery schedules. Therefore, the agency's basis for excluding DHL from discussions was not reasonable. Further, the agency conducted discussions with the remaining offeror, MFI, on the basis of a revised delivery schedule which also extended beyond the RFP's "required" schedule.

Under these circumstances, since there was no basis to reject DHL's offer, and the agency held discussions on

relaxed delivery terms similar to those proposed by DHL, the agency was required to conduct discussions with the protester. See The MAXIMA Corp., B-222313.6, Jan. 2, 1987, 87-1 CPD ¶ 1; Information Ventures, Inc., B-232094, Nov. 4, 1988, 88-2 CPD ¶ 443. The agency failed to hold discussions with DHL or allow it to submit a revised proposal, both of which could have affected the outcome of the competition since DHL's initial offer was substantially lower priced than MFI's offer. See Bromma, Inc., 66 Comp. Gen. 433 (1987), 87-1 CPD ¶ 480. We therefore sustain the protest.

In determining the appropriate remedy, we do not believe it is feasible--in light of the agency's continuation of performance of the contract pending the outcome of DHL's protest--for the agency to reopen discussions.

Instead, we find that DHL is entitled to the award of its costs of filing and pursuing the protest, including reasonable attorneys' fees, as well as its proposal preparation costs. 4 C.F.R. § 21.6(d) (1994). DHL should submit its detailed certified claim for costs directly to the contracting agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

/s/ James F. Hinchman
for Comptroller General
of the United States

B-256451

June 22, 1994

Vice Admiral E.M. Straw
Director, Defense Logistics Agency

Dear Admiral Straw:

Enclosed is a copy of our decision of today sustaining the protest of DHL Enterprises, Inc. filed in connection with request for proposals No. DLA500-93-R-A140, issued by the Defense Industrial Supply Center. We sustain the protest because the agency improperly failed to hold discussions with the protester.

Since it is not feasible to recommend reopening discussions with the offerors, given the extent of contract performance, we find that DHL is entitled to recover the cost of filing and pursuing its bid protest, including reasonable attorneys' fees, as well as its proposal preparation costs. See 31 U.S.C. § 3554(c) (1988); 4 C.F.R. § 21.6(d) (1994).

Since the enclosed decision contains a recommendation for corrective action, we direct your attention to 31 U.S.C. § 3554(e)(1), which requires that the head of the procuring activity responsible for the solicitation report to our Office if the agency has not fully implemented our recommendations within 60 days of our decision. Please advise us in any case of the action taken on the recommendation.

Sincerely yours,

/s/ James F. Hinchman
for Comptroller General
of the United States

Enclosure